

**STATE PERSONNEL BOARD, STATE OF COLORADO**  
Case No. **2002B050**

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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**ALAIN P. RIGAUD,**

Complainant,

vs.

**DEPARTMENT OF CORRECTIONS,  
CORRECTIONAL INDUSTRIES,**

Respondent.

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Administrative Law Judge Kristin F. Rozansky held the hearing in this matter on February 6, March 4 and 5, 2002, at the Division of Administrative Hearings, 1120 Lincoln, Suite 1400, Denver, Colorado. Assistant Attorney General Jill M.M. Gallett represented Respondent. Complainant appeared and represented himself.

**MATTER APPEALED**

Complainant, Alain P. Rigaud ("Complainant" or "Rigaud"), appeals his termination by Respondent, Department of Corrections ("Respondent" or "DOC"). Complainant seeks reinstatement, or a suspension without pay for thirty, sixty or ninety days, or permission to resign in lieu of termination.

For the reasons set forth below, Respondent's action is **affirmed**.

**ISSUES**

It was uncontested by Complainant that he committed the acts for which he was disciplined. In addition, neither party requested attorneys fees. Therefore, the only issues for purposes of hearing were:

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law; and
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority.

## **FINDINGS OF FACT**

### **General Background**

1. Complainant started working for DOC on June 1, 1998, and was terminated from his employment with DOC on November 30, 2001.
2. On April 1, 2001, Complainant was a Correctional Officer I ("COI") in the Recreation Department at the Denver Women's Correctional Facility ("DWCF"). On August 1, 2001, Complainant was transferred to Correctional Industries at DWCF's Multi-Media Center, as a Production Supervisor I, with a working title of Multi-media Specialist. He was hired to train female inmates in the production of videos.
3. Correctional Industries is a division of DOC whose purpose, pursuant to statute, is to train inmates in various trades and make a profit through the operation of various businesses. Each business is referred to as a "cost center" and has a manager overseeing its operation and the hiring of inmates. Complainant was in charge of the hiring for DWCF's Multi-Media Center.
4. Catherine Royer was an inmate at DWCF who was hired by Complainant to work in the Multi-Media Center.

### **Psychology of Interactions Between Inmates and Correctional Officers**

5. Dr. Joseph Abramajtys was qualified and testified as an expert in the psychology of interactions between inmates and correctional officers.
6. A correctional facility setting is a totalitarian environment in which inmates are deprived of many rights. Inmates will often manipulate staff in order to relieve that deprivation, a normal reaction to the totalitarian environment.
7. Given that there will be interaction between inmates and staff members, mechanisms must be provided, usually in the form of procedures and policies, so that there is a clear understanding of the behavioral expectations and normal, safe and sanctioned ways for these two groups to interact.
8. Staff may be friendly with inmates; however, they must not become overly familiar with inmates. In maintaining this distinction it is not necessary for staff to be cold or relentless with inmates. However, staff members must be careful to insure that whatever their own personal needs are, that inmates are not meeting those needs.
9. Inmates can manipulate staff in subtle ways, including through a discussion of a staff member's personal life, as well as escalating from the breaking of very minor rules up through committing more serious infractions.

10. When an inmate discusses with a staff member that staff member's personal life, areas of common interest are found. An inmate will begin diminishing other staff by telling the staff member that he or she is better at "x" than other staff. The inmate will develop an identification base with the staff member by pointing out similar likes and dislikes and assisting the staff member in his or her duties so that he or she begins to rely heavily on the inmate. Eventually this scenario will lead to the staff member developing an "us vs. them" mentality with the inmate.
11. An inmate who is manipulating a staff member in the area of rules will initiate the process by talking about the rules. The inmate will then break minor rules in front of the staff member. At some point the inmate will ask the staff member to do something that involves breaking a minor rule. For instance, the inmate may ask the staff member to mail a personal or romantic letter so that "prying eyes" won't see its contents. The inmate typically progresses then to asking for cigarettes and/or magazines. Eventually a staff member will have opened himself up to extortion with the inmate threatening to tell about the other rule infractions if the staff member refuses to cooperate in more serious infractions.
12. In some rare cases of manipulation through rule infractions, a staff member may assault an inmate in order to regain control over the inmate. In addition, if an inmate believes another, manipulation through rule infractions may begin a cycle of violence within staff member will report an infraction, the inmate may assault that staff member.
13. The overall problem with unchecked manipulation of staff by inmates is that control is inappropriately compromised and/or surrendered. The involved staff member and/or other staff members, as well as inmates, may be placed in dangerous situations.
14. It is very difficult to rehabilitate a staff member who has lost his or her control over inmates. Other staff members have difficulty trusting that staff member to comply with the proper rules and procedures in interacting with inmates. In addition, other inmates learn of the staff member's lack of control over a particular inmate and will try to gain the same advantages for themselves.

### **Training of DOC Employees**

15. Prior to beginning work at any of DOC's facilities, all DOC employees must attend a twenty-one day preservice training at DOC's Training Academy. The training fosters an organizational culture of one team and one mission and provides all employees with the same information regarding DOC's procedures and rules.
16. In order to insure that all employees receive the same information at the preservice training, instructors are provided with prompts in their course outlines to insure that certain information is consistently discussed in every class.

17. During the preservice training, seven hours of class time is spent on “Offender Management,” a course on how to supervise and manage inmates. The “mantra” throughout this portion of the training is to be firm, fair and consistent and that ethics is the basic foundation for the management of offenders.
18. During the “Offender Management” course, all DOC employees are taught that inmates will notice immediately if one inmate is treated differently and such treatment will open up the DOC employee to being compromised by other inmates. They are also taught that friendship is allowed amongst staff members but is not permitted between staff and inmates.
19. DOC’s Staff Code of Conduct, AR 1450-01 provides guidance to staff on professionalism and the conduct expected of DOC employees. All DOC employees, including Complainant, receive their own copy of the regulation at the preservice training. In addition, a copy of the regulation is available on DOC’s website.
20. There is specialized training for DOC employees on the supervision of distinct inmate populations, including female, geriatric and youthful inmates.
21. In addition to his preservice training on the supervision of inmates, during his twenty-seven months at DOC, Complainant received 298 hours of training at DOC’s Training Academy. He took the following courses related to the supervision of inmates and/or ethics and professionalism:
  - a. “Ethics and Professionalism” - a seven-hour course on DOC’s Staff Code of Conduct;
  - b. “Legal Issues” – a two-hour course on liability issues in dealing with inmates;
  - c. “Working with Female Offenders” – an eight-hour course on supervising female inmates;
  - d. “Professionalism” – a four-hour course reviewing the DOC Staff Code of Conduct;
  - e. “Games Criminals Play” – a four-hour course on setting professional boundaries in interactions with inmates.
  - f. “Sexual Misconduct in Correctional Settings” - a four-hour course which teaches, amongst other things, the definition of sexual misconduct, the difference between being friendly and being friends, and the consequences of being friends with an inmate;

#### **Correspondence from Complainant to Royer**

22. Complainant wrote at least eight letters to Catherine Royer from August 21, 2001 to October 4, 2001.
23. Royer was an inmate at DWCF who was hired by and worked with Complainant in

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Correctional Industries' Multi-Media Center program at DWCF. She was paroled on September 27, 2001, sponsored by her boyfriend, and lived in Roswell, New Mexico, pursuant to the Interstate Parolee Compact between Colorado and New Mexico.

24. Five of Complainant's letters to Royer began with the salutation "Dearest Catherine" or "My dear Catherine." Some of the letters were signed, "I miss you – Alain;" "Always yours – Alain;" or "Always yours mon amour." Many of the letters included Complainant's mailing address.
25. One of the letters included a request that Royer send Complainant her phone number or call Complainant at his home.
26. Complainant signed a fictitious name, either Gaetan Martin or Gary Stewart, to some of the letters. One of those letters was sent to Royer at the DWCF, prior to her parole and included the statement "I bet you're as pretty as ever."
27. Complainant sent Royer at least five photos of himself.
28. In one of the letters Complainant told Royer that he would be stopping in Roswell, New Mexico, to see her on his way to Mexico. In that same letter he asked her where was the closest commercial airport to her.
29. Complainant wrote Royer after she was released on parole that he could write freely to her now that she was released from DWCF and there were "no more snooping officers reading your mail."
30. Complainant told Royer about the perspective of another female inmate, Melissa Johnson, on his and Royer's relationship. He quoted Johnson as saying, "The chemistry was strong. I saw it. These two just clicked together. They thought the same. Their relationship was smooth as silk." He went on to say that he agreed and that "we seemed to like the same music – art and so on."
31. Complainant wrote Royer about Johnson's view of Royer's personality, that Johnson looked upon Royer as a role model. He described Johnson as "a very perceptive person."
32. In one of Complainant's letters he told Royer that the reason behind a female guard's abrupt resignation was the discovery, by another staff member, of the guard and an inmate in an intimate embrace.

#### **R-6-10 Meeting and Disciplinary Action**

33. On October 22, 2001, the warden of DWCF received information from New Mexico Department of Corrections regarding the letters and photographs Complainant had sent to Royer. Royer had complained about the letters to her parole officer in New Mexico.

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34. As a result of the information about Complainant's letters to Royer, Complainant was put on paid administrative leave pending investigation.
35. Richard Schweigert, Director of Division of Correctional Industries and Complainant's appointing authority, held a R-6-10 meeting on November 13, 2001 with Complainant.
36. During the R-6-10 meeting, Complainant admitted to writing the letters to Royer. He also told Schweigert that he missed Royer and wished she would come back.
37. Prior to imposing discipline, Schweigert reviewed Complainant's work history, the letters he wrote to Royer and Royer's work history. He also considered whether Complainant could be rehabilitated given the level of compromise in this situation.
38. The level of compromise was quite high because at least five inmates knew of Complainant's relationship with Royer.
39. Prior to imposing disciplinary action, Schweigert considered imposing a corrective action, suspension or demotion, but rejected them as options because they all involved the Complainant returning to DWCF and, given the level of compromise, none of the actions was feasible. All of those actions would have involved leaving Complainant in his position at DWCF, which would endanger other staff and inmates as well as Complainant himself.
40. Complainant was terminated, on November 30, 2001, from his DOC employment for violating DOC's Staff Code of Conduct, in particular, AR 1450-01, Sections III(B) and IV(D), (F), (M), (N) and (ZZ). The provisions of these sections are:
  - a. Section III(B): Conduct Unbecoming: Includes any act or conduct either on or off duty, which impacts job performance, not specifically mentioned in Administrative Regulations which tends to bring the DOC into disrepute or reflects discredit upon the individual as a correctional staff.
  - b. Section IV (D): Staff may not knowingly maintain social, emotional, sexual, business or financial associations with current offenders, former offenders, or the family and/or friends of offenders. This also includes, but is not limited to, telephone calls, letters, notes, or other communications outside the normal scope of employment.
  - c. Section IV (F): Staff shall not discuss with offenders their personal life or another staff's personal life.
  - d. Section IV (M): Staff shall avoid situations which give rise to a direct, indirect or perceived conflicts of interest.
  - e. Section IV (N): Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his or her position,

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or casts doubt upon the integrity of the staff is prohibited. Staff will exercise good judgment and sound discretion.

- f. Section IV (ZZ): Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute or reflects discredit upon the individual as a correctional staff, is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action.

- 41. An "offender" is defined in DOC's Staff Code of Conduct, AR 1450-01 Section III(E), as "any individual under the supervision of the criminal justice system to include community corrections client, parolee, correctional client, youthful offender system resident, probationer or offender." (emphasis added).

## **DISCUSSION**

### **I. GENERAL**

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. *McPeck v. Colorado Department of Social Services*, 919 P.2d 942 (Colo. App. 1996).

## **II. HEARING ISSUES**

### **A. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.**

Arbitrary or capricious exercise of discretion can arise in only three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Van de Vegt v. Board of Com'rs of Larimer County*, 55 P.2d 703 (Colo. 1936) and *Lawley v. Dep't of Higher Educ.*, No. 00SC473, slip op. (Colo. December 3, 2001).

In this action, the appointing authority reviewed the evidence before him and exercised his discretion to discipline Complainant in a reasonable fashion. Complainant violated many of DOC's administrative regulations by his numerous letters to Royer.

In a three year period Complainant had participated in at least twenty-nine hours of training from DOC in the appropriate boundaries between inmates and staff members and the applicable DOC administrative regulations. Some of this training specifically dealt with supervision of female inmates by male staff members. Less than six months before Complainant began writing Royer, he took a four-hour training on sexual misconduct in a correctional facility. Complainant had received a copy of DOC's Staff Code of Conduct during his preservice training. Complainant, at best, should have been aware that his letters to Complainant, let alone the tone and language of those letters, was a violation of DOC's administrative regulations.

There was no evidence of similarly situated employees being treated differently. There was no evidence that Schweigert failed to consider evidence or did not attempt to obtain evidence. In short, Schweigert did not act arbitrarily or capriciously in disciplining Complainant for his actions.

Complainant's letters violated DOC's Staff Code of Conduct, in particular AR 1450-01, Sections III(B) and IV(D), (F), (M), (N) and (ZZ). There is no ambiguity that the definition of an "offender" under DOC's administrative regulations includes parolees.

Under Board Rule R-6-9, 4 CCR 801, an agency may discipline an employee for willful violation of an agency's rules. In light of Complainant's training while at DOC and the plain language of the applicable administrative regulations and the definition of offender, his conduct is a willful violation of DOC's Staff Code of Conduct. In disciplining Complainant, Respondent has not acted contrary to rule or law.



## **B. The discipline imposed was within the range of reasonable alternatives**

In deciding the level of discipline to be imposed, an appointing authority must pursue his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule R-6-6, 4 CCR 801.

Complainant, at best, had developed, at least in part, an "us (Royer and himself) vs. them (DOC)" mentality. This is apparent in his reference to "snooping officers" reading Royer's mail – officers who were his fellow staff members. It is also apparent in his relating to Royer, Johnson's remarks regarding his and Royer's relationship. His comment about the similarities in his and Royer's taste in music and art also demonstrates Complainant's strong sense of identification with Royer. The comments portray two people who are a team, not a DOC male staff member who is maintaining appropriate boundaries with an inmate. While such a relationship may be appropriate in another setting, it is not in the context of this action.

Further indication of Complainant's "us vs. them" mentality may be found in Complainant's comments about the resignation of another staff member. In telling Royer about the other staff member's personal life, Complainant has gone beyond his own life to discussing one of his own colleague's failings with an inmate.

The tone and language of Complainant's letters, the salutations and signatures and his comment regarding Royer's physical appearance, reflect a relationship that has, at least from Complainant's perspective, gone beyond the boundaries of friendly to overly familiar. In addition, there is Complainant's statement to Schweigert that he misses Royer and wishes she were back. Complainant has gone well beyond the boundaries allowed between a DOC staff member and an offender.

Finally, there are Complainant's comments to Royer about Johnson, another inmate. Johnson is portrayed by Complainant as a sympathetic figure to him, discussing with him Royer's personality and Complainant's relationship with Royer. Complainant is again engaging in the process of being manipulated by an inmate.

Given the level of compromise in this matter, it would have been very difficult to rehabilitate Complainant and return him to the workplace. This is not a situation in which a staff member has engaged in an inappropriate relationship with an inmate ended the relationship and regained control. Rather it involves a staff member who continually engaged in inappropriate behavior, moving from writing to an offender to requesting the offender call him at home and stating that he intended to make a personal visit to the inmate. There is no indication that Complainant intended to end his contact with Royer. The matter is compounded by the indication that a new cycle was beginning with Johnson.

Under these circumstances, a corrective action, demotion or suspension would not be appropriate. Complainant's own actions exacerbated the situation to the point that termination is the only viable disciplinary option.

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### **CONCLUSIONS OF LAW**

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
2. The discipline imposed was within the range of reasonable alternatives.

### **ORDER**

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 10<sup>th</sup> day of April, 2002.

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Kristin F. Rozansky  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, CO 80203  
303-894-2136

## **NOTICE OF APPEAL RIGHTS**

### **EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

## **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

## **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

## **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

## **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

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**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of April, 2002, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Alain P. Rigaud  
10831 Blue Jay Lane  
Northglenn, Colorado 80233

and in the interagency mail, to:

Jill M.M. Gallett  
First Assistant Attorney General  
Department of Law  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203

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Andrea C. Woods